

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

GRAPHIC COMMUNICATIONS  
CONFERENCE/INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS LOCAL UNION  
NO. 735-S

and

Case 04-CB-215127

BEMIS COMPANY, INC.

**BRIEF BY COUNSEL FOR THE GENERAL COUNSEL**

To: Honorable David I. Goldman  
Administrative Law Judge

Dated: December 3, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lea F. Alvo-Sadiky', is written over a horizontal line.

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## **I. INTRODUCTION**

This case involves the fallout that occurred after Bemis Company, Inc. (Bemis) learned in mid-December 2017 that Dominic DeSpirito, the President of Graphic Communications Conference/International Brotherhood of Teamster Local Union No. 735-S (Respondent) and an employee of Bemis, subjected employee Joseph Stasko to ongoing lewd and sexually-themed harassment. Bemis conducted an investigation, suspended DeSpirito on December 11, 2017, concluded that DeSpirito had violated its policies, and discharged DeSpirito on January 18, 2018. On December 18, 2017, Lynn Andrews, Respondent's Secretary-Treasurer, and an employee of Bemis, as are all Respondent's officers and Board members, went down to the Press break room to confront Stasko who had participated in the investigation. Andrews made an implied threat to the employee that reporting harassment committed by a Union official or opposing the Union would lead to unspecified consequences. Following DeSpirito's termination in January 2018, the Union posted a notice to employees on its bulletin board and at the lunchroom at the facility penned by DeSpirito that was intended to discourage employees from reporting DeSpirito's harassing behavior toward Stasko, and with the clear message that doing so could result in adverse consequences by Respondent—including blacklisting. Around that same time, Respondent's Vice President Kevin Davidovich threatened Mike Samsel, an employee and member, with physical violence and property damage for participating in Bemis' investigation into DeSpirito's actions and told him that DeSpirito had instructed Respondent's Board members to harass employees who reported his alleged misconduct to Bemis.

Respondent's actions did not stop there. In January 2018, Andrews retaliated against Stasko for cooperating in Bemis' investigation against Respondent's President by reporting him to Bemis for safety violations with the intent of having Stasko disciplined. First, Andrews

complained to Stasko's supervisor and her own supervisor that Stasko was not wearing his hearing protection—a *de minimus* safety violation that is not normally cause for discipline. Second, on January 25, 2018, Andrews complained to Bemis that Stasko had cut a pizza at a safety meeting with his safety knife. Andrews did not just complain about this— she called the corporate hotline to report the incident. Then, she called the Safety Manager about the incident. And finally, she called Bemis' Human Resource Manager and Safety Manager demanding to know why Stasko had not been disciplined. Thus, rather than representing Respondent's members these officials engaged in a pattern of threatening and reporting these employees to Bemis in an effort to retaliate against them for cooperating in the investigation that lead to the suspension and discharge of Respondent's President.

## **II. PROCEDURAL HISTORY**

On February 20, 2018, Charging Party Bemis filed the charge in Case 04-CB-215127, and a copy was served on Respondent by U.S. mail on February 21, 2018. (GCX1(a)-(b))<sup>1</sup> On March 6, May 29 and June 18, 2018, Bemis filed amended charges, which were served on Respondent on March 6, May 31 and June 19, 2018, respectively. (GCX1(c)-(h)) On June 25, 2018, the Regional Director of Region 4 issued a Complaint and Notice of Hearing alleging that Respondent had engaged in conduct that violated Section 8(b)(1)(A) and (2) of the Act. (GCX1(i))

On July 29, 2018, Respondent filed an Answer to the Complaint. (GCX1(k)) The Answer to the Complaint admits service of the charges, jurisdiction, Respondent's status as both a labor organization and the exclusive representative for employees at the Bemis West Hazleton, PA

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<sup>1</sup> Throughout this brief, abbreviated references are employed as follows: "T" followed by page number to designate Transcript pages; "GCX" followed by exhibit number to designate General Counsel's Exhibits; and "RX" followed by exhibit number to designate Respondent's Exhibits.

facility (Plant), and the agency status of DeSpirito, Andrews and Davidovich. The hearing in this case was held in Hazleton, Pennsylvania on October 22, 2018.

### **III. ISSUES**

A. Whether Respondent, by Secretary–Treasurer Lynn Andrews, violated Section 8(b)(1)(A) of the Act, on December 18, 2017, by impliedly threatening employee and member Stasko that employees who oppose Respondent, or report alleged misconduct by Respondent’s President to the Employer, would be subject to unspecified reprisals? (Complaint Paragraph 6(a))

B. Whether Respondent violated Section 8(b)(1)(A) of the Act, in late January 2018, by posting a notice in two locations at the Plant which contained, inter alia, the following language:

The events that are happening are very troubling. We as Union Brothers and Sisters do not turn each other in if we have an issues [sic] we go to a steward or a board member. Turning in fellow Union members is a violation of the Union by laws [sic] and could result in fines and black listed [sic] from all union jobs. . . . Thank you. Dominic DeSpirito (Complaint Paragraph 6(b))

C. Whether Respondent, by Vice President Kevin Davidovich, violated Section 8(b)(1)(A) of the Act, in late January 2018, by: (i) threatening employee and member Samsel that Respondent would engage in physical violence and cause property damage if employees were to express opposition to Respondent, or to report alleged misconduct by Respondent’s President to Bemis; and (ii) telling Samsel that Respondent’s President had instructed Respondent’s Board members to harass employees who reported alleged misconduct by Respondent’s President to the Employer? (Complaint Paragraph 6(c))

D. Whether Respondent, by Secretary–Treasurer Lynn Andrews, violated Section 8(b)(1)(A) and (2) of the Act, by reporting employee and member Stasko to Bemis for purported safety infractions on three occasions in January 2018 in an attempt to cause Bemis to discipline



Stasko because (i) Stasko participated in Bemis' investigation of alleged misconduct by Respondent's President and (ii) for reasons that are arbitrary, discriminatory, or in bad faith? (Complaint Paragraph 7)

#### **IV. STATEMENT OF FACTS**

##### *A. Background*

Bemis operates a plant in West Hazleton, PA, where it makes plastic bread bags. (T. 25) Respondent represents a bargaining unit of about 350 production and maintenance employees. (T. 26) With one exception, that being Respondent's President, Respondent's entire Executive Board, consisting of about seven employees, currently work at the Plant. (T.28) The parties have a collective-bargaining agreement with a term from August 15, 2016 through August 14, 2020. (T. 27; GCX3)

Dominick DeSpirito, Respondent's President, worked at the Bemis Plant for approximately 30 years. At the time of his termination he held the position of Journeyman Press Operator. (T. 27-28) Around December 14, 2017, Bemis learned from employee Jimmy Kassak, a Journeyman Press Operator, that DeSpirito had been allegedly verbally harassing Joe Stasko, a Press Assistant, from September 2017 through December 2017, with lewd and sexual comments. Bemis promptly started an investigation into the matter, calling employees, including Stasko, to speak with Human Resources. (T. 30-32, 68, 71-72, 159) That same day, December 14, 2017, DeSpirito was suspended for the alleged harassment of Stasko. (T. 31,162) On January 18, 2018, DeSpirito was terminated by Bemis for violation of the Bemis harassment policy and core

values. (T. 27, 33) Respondent has grieved DeSpirito's discharge and has been proceeding through arbitration.<sup>2</sup> (T. 15, 29, 30, 66)

In mid-December 2017, Journeyman Press Operator Mike Samsel was asked by Human Resources to participate in the investigation concerning DeSpirito. Samsel knew what the investigation was about through word on the floor of the Plant. (T. 161) That evening, when he was in his car leaving work, DeSpirito called him on his cell phone and asked him what was going on in the Plant. Samsel told him that employees were getting called in about things going on with DeSpirito. DeSpirito told him he was suspended. Samsel replied, "Well, I'm not going to lie for you if I get called." DeSpirito said he did not want Samsel to lie and did not expect him to. Samsel testified that DeSpirito then said that when he gets back, that "nobody was safe, they better watch their back [sic]", and DeSpirito "wasn't going to do anything for them."<sup>3</sup> (T. 161-162, 195)

*B. Lynn Andrews Seeks to Intimidate Stasko*

In the middle of December 2017, a day or two after DeSpirito was suspended, Stasko and Samsel were in the Press break room sitting at a table. Secretary-Treasurer Lynn Andrews, who as a Bag Operator does not normally use the Press break room, came into the Press break room. (T. 72-73, 94, 164-165; GCX1(i), par. 4; GCX(k)) Andrews testified that DeSpirito told her that she needed to go and see the employees who had taken part in the investigation and talk to them herself about the investigation. (T. 214) She was clearly upset. She started yelling at Stasko while waving her finger in his face. She yelled at him that she was going to get to bottom of it; how could he do this to Dominic? She told him she does not know what's going on and she was

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<sup>2</sup> Respondent filed an unfair labor practice charge against Bemis, Case 04-CA-215775, over DeSpirito's discharge. That case has been deferred. (T. 15, 66)

<sup>3</sup> This conversation was not in Samsel's affidavit. Samsel testified that it was not in his affidavit because he may not have recalled the statement at the time that the Board agent took his statement. (T. 179, 196)

going to conduct her own investigation.<sup>4</sup> Stasko did not say anything. She then left the break room. The whole incident lasted 30 to 45 seconds. (T. 73-75, 88, 165, 181)

*C. Respondent Posts a Notice that Threatens to Blacklist Members Who Turn in Fellow Members*

On January 22, 2018, Andrews posted a copy of the *Communicator*, a Respondent publication, on the Union bulletin board and also at the entrance to the employee break room. The *Communicator* was posted for less than 24 hours. (T. 9-10, 97; GCX2)

The *Communicator* stated in its entirety:

“The events that are happening are very troubling. We as Union Brothers and Sisters do not turn each other in if we have an issues [sic] we go to a steward or a board member. Turning in fellow Union members is a violation of the Union by laws [sic] and could result in fines and black listed [sic] from all union jobs. It has also come to the Union [sic] attention that people are writing on walls and contacting the people that went to the company instead of doing the right thing. Please do not do this or jeopardize your job. This issue as most have stated is unfair. We will fight this as we fight all issues. Do not let this Company divide this Union or pit brother and sister against each other. Thank you. Dominic DeSpirito.”

*D. Respondent Vice President Kevin Davidovich Threatens Mike Samsel*

In late January 2018, at around 6:45 p.m., Samsel, who was ending his shift, had a conversation with Respondent Vice President Kevin Davidovich, who was starting his shift, near Press 23. No one else was present. (T. 128, 166, 167, 202; GCX1(i), par. 4; GCX(k)) Davidovich walked up to Samsel, and asked if Pienkowski, the HR Director, was on the floor shaking hands and congratulating people that DeSpirito got fired. Samsel asked him where

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<sup>4</sup> Andrews denied making the statements above and waving her finger in Stasko’s face. She testified that all she said to him was “Joe, do you mind if I talk to you tomorrow?” (T. 215) This testimony should not be credited. Stasko and Samsel, who were sequestered, testified similarly concerning what occurred in the break room. While the incident did not appear in Samsel’s Board affidavit, he credibly testified that the Board Agent did not ask him about that incident at the time he gave the affidavit. (T. 181; RX1)

would he get something like that from. Davidovich said he was told. Samsel responded, “No, that didn't happen.” Samsel then told Davidovich that he did not appreciate the things that were being found or left at his press.<sup>5</sup> Samsel was referring to notes being left with “rat” on it, Christmas cards with the word “rat” on it, and homemade paper rats around press 23, his work area.<sup>6</sup> Davidovich replied that it could get much worse. Samsel asked him what he meant by that. Davidovich said, “Lucky it isn’t settled like the old days,” “caving in skulls, smashing lockers, people's personal properties and cars.”<sup>7</sup> Samsel responded that he was the Vice President of the Union and he shouldn't be talking that way. He said, “That's not how it's supposed to go.” Davidovich replied, “It's going to get worse.” Samsel said, “Well, why?” Davidovich answered, “Because Dominic’s told him to go after the rats.”<sup>8</sup> That was the end of the conversation. (T.167-168, 169, 182-183, 186; RX1, pp. 2-3, RX2)

#### *E. How Safety Complaints Are Made at Bemis*

Carl Passler, Environmental Health and Safety Manager, testified that anyone in the Plant can make safety complaints. (T. 107, 110) Safety complaints are made at the Plant by several different methods. (T. 109) One method involves reporting of near-misses—something that is out

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<sup>5</sup> Davidovich testified that Samsel approached him and told him about finding “little artifacts” near his press and that Bemis was collecting them. Davidovich testified that he responded, “Well, that's a good thing. Let them collect them. If I don't know who's doing it or where it's coming from, I can't stop it.”

<sup>6</sup> There is no proof that Respondent was responsible for placing the “rat” notes and items near Press 23. (T. 176)

<sup>7</sup> On direct, Samsel stated Davidovich said, “They can settle like the old days, caving in skulls, smashing lockers, people's personal properties and cars.” On cross-examination, Samsel agreed that the statement he gave Bemis the day after was his best recollection of what occurred—which included the phrase “Lucky this isn’t settled like the old days...” This phrase was not in his affidavit. (T. 183, 191, 194; RX1, RX2) Davidovich, while denying how the conversation occurred, essentially corroborated Samsel by testifying that he told Samsel, “Well, you know, thankfully, it's not like in years past where people's toolboxes were getting vandalized, lockers were being caved in, or cars were being keyed.” (T. 203)

<sup>8</sup> On cross, Samsel confirmed that Davidovich told him during this conversation that DeSpirito had instructed Respondent Board members, not just him, to harass employees. (T. 186) In his affidavit, Samsel stated that “Davidovich said that DeSpirito was telling Board members to harass us.” (RX1, p. 3) In his statement to Bemis, which he provided to Bemis the next morning, Samsel stated “Dominic is telling Union people to harass “rats.” (sic) (RX2) Davidovich’s denial of this statement should not be credited. (T. 203) Despite intense cross examination, Samsel’s testimony, while using different words, is consistent with both the statement and his affidavit and is credible.

of the ordinary, e.g. a piece of guarding missing in a machine, an extension cord across a walkway, pallets out of place. Employees have three ways they can report a near-miss. They can go directly to their supervisor; they can fill out an observation card with the box checked off that says “near-miss” and hand that to their supervisor; or they can go to the safety advocate, Denise Eisley. (T. 109, 112, 113) Most safety complaints are made to supervisors. (T. 136) Supervisors also fill out observation cards for near misses, although they can also email a near miss to Passler. (T. 112) Another method for reporting safety complaints is for employees to report safety issues directly to their supervisors or the safety advocate. Generally, the types of safety complaints made by employees would be situations like holes in the floor in the Plant, missing guard rails, doors not closing properly, water leaks in the ceiling, and other items like that. (T.109-110) In addition, once in a while safety complaints, including near-misses, are made directly to Passler, either by employees or supervisors. These may occur when he is walking through the Plant. Employees may bring a safety issue to him if the supervisor has not been able to handle an issue. Sometimes, an issue may come out at a safety meeting. (T. 109, 113)

#### *F. Personal Protective Equipment at Bemis*

Within the Plant, Bemis has basic required personal protective equipment (PPE) that employees are supposed to use – safety shoes, safety glasses, and hearing protection. There are also specialized PPE for other tasks that may be needed to be done. (T. 42, 76, 86, 110-111) The function of the hearing protection is to minimize noise exposure for chronic hearing loss. There are three types of hearing protection that employees can choose to wear that Bemis provides: 1. Foam-type hearing protection, which is inserted into the ear; 2. Over-the-ear protection that looks like earmuffs; and, 3. Black-banded ones called Sensio. (T. 110, 114)

Depending on which hearing protection is used, the hearing protection will block 7 to 15 decibels of noise at the Plant. While it is possible to have a conversation with another person at the Plant with hearing protection on, a lot of employees have a hard time hearing with it on. As a result, Passler has witnessed employees and supervisors taking off their hearing protection while they are having a conversation. Employees are not disciplined for this. Passler has also taken off his hearing protection at times while having a conversation in the Plant. (T. 115-116)

Failing to wear PPE may be reported as a near-miss. When it is reported as a near-miss it does not state the employee's name, it just states the department. (T. 111) The safety advocate, Eisley, will report employees not wearing PPE to Passler but without giving him the name of the employee. She might tell him that she is getting a lot of complaints about employees not wearing PPE in a certain area on a certain shift and that he should take a walk around and take a look. (T. 113, 133, 142) When that happens, Passler will go to the area at the specified shift to observe. When employees are observed not wearing PPE, whether by Passler, the safety advocate or a supervisor, they are told that they need to put the PPE on. (T. 43, 55, 86, 113-114, 136, 137-138)

Employees are not routinely disciplined for not wearing PPE. (T. 43, 49, 114) In the last two years, only one bargaining unit employee, Kevin Gadzeak, was given a verbal discipline for not wearing PPE—his safety glasses—after he was repeatedly asked to put them on. (T. 50, 55, 135) Safety violations run from minor to major violations. On that scale of minor to major, PPE violations are usually considered to be in the minor or medium range. There are no PPE violations that fall under the major category.<sup>9</sup> (T. 132-133) Probationary employees have been

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<sup>9</sup> A major safety violation would be putting oneself or another employee at serious risk of serious harm or death. (T. 133)

terminated for not wearing safety equipment but it is usually for not wearing multiple pieces of PPE. (T. 150)

*G. Lynn Andrews Reports Stasko to Bemis for Failing to Wear His Hearing Protection*

In the middle of January 2018,<sup>10</sup> Stasko was talking to the forklift driver in front of press 23, which is in front of the press office where the supervisors and the safety advocate sit. Because he has some hearing loss and the Plant is noisy, Stasko removed his hearing protection and put it on top of his hat so that he could hear what the forklift driver was saying. As he was talking, Stasko saw Andrews going into the press office. (T.78) He and Andrews had direct eye contact as she was going into the office. (T. 79)

Andrews admits that she reported Stasko to Bemis for not wearing his hearing protection.<sup>11</sup> She testified, “I went in [to the press office] and I said, you know, he doesn't have his earmuffs on.” “None of you say anything. He gets away with anything.” (T. 97-98, 216) Although she did not mention Stasko’s name, it was clear who she was referring to. (T. 97-98, 215-216) Andrews agreed that Respondent has a policy against employees turning in other employees for alleged misdeeds and that it frowns on that type of behavior. (T. 96) Andrews claimed that she only went in there because another union member came to her and complained, “I got told about my hearing, how come he doesn't get told?” Andrews further admitted that prior to this she had never reported a fellow employee for a safety violation. (T. 98) Andrews further testified that there was a feeling in the Plant that certain people, including Stasko, get away with everything—and those were the employees who have testified or who have participated in the investigation against DeSpirito. (T. 220)

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<sup>10</sup> According to Andrews it was January 25, 2018. (T. 216)

<sup>11</sup> Andrews denies that Stasko was talking to a forklift driver when he reported him. (T. 216)

About four or five minutes later, Eisley, the safety advocate, came out on the floor and told Stasko that Andrews had complained to Glenn Youngcourt, Andrews' supervisor, Mike Parker, Stasko's supervisor, and her that Stasko did not have his hearing protection in. (T. 77, 90-91) When Eisley spoke to him he was already wearing his hearing protection. (T.79) Stasko was not disciplined for not wearing his hearing protection. (T. 80, 211, 219)

According to Andrews, Eisley had reported to her three times that Stasko never wore his hearing protection. (T. 98) She admitted, however, that she only saw Stasko once without his hearing protection and that she did not make it a practice to report employees for not wearing hearing protection. (T. 221) Eisley testified that Stasko has occasionally been seen not wearing his proper hearing protection and that in those circumstances she has told him to put it on. She further testified that she was not aware of employees receiving discipline for failing to wear safety equipment. (T. 211) Passler testified that Stasko was not known as a habitual safety violator. Nor was he advised by supervisors or the safety advocate that Stasko was not wearing his hearing protection PPE. (T. 133, 140, 142)

*H. On January 25, 2018, Lynn Andrews Reports Stasko for Committing Another Safety Violation*

On the morning of January 25, 2018, Andrews came to Leslie Pienkowski, Bemis' HR Manager, upset. Andrews claimed that the night before when she was leaving work she bent down to scratch her leg, and when she sat up, she noticed Stasko staring at her from approximately two parking spots down. He did not say anything or make any gestures toward her. Bemis was unable to verify her assertion as Stasko did not recall seeing her and the cameras in the parking lot were not working. Stasko was not disciplined. (T. 33-34, 46-47, 48, 84-85, 217, 218-219)



Later that day, Stasko attended a safety meeting. Passler brought pizza for the meeting. The pizza boxes were set on tables shaped like a “U.” (T. 125, 142, 205, 211) Passler was talking to one side of the room when Michelle Hernandez said, “Hey, he's cutting the pizza with his knife.” Stasko had taken the blade out of his hook knife and cut the crust on the pizza. A hook knife is one of the cutting tools used at the Plant to remove certain layers of film off of a roll or to cut film. When Passler looked in that direction, he saw Stasko putting a hook knife in his pocket. Passler said, “I didn't see it.”<sup>12</sup> Nothing further was said at the meeting about this. The meeting went on from there. (T. 125-126, 144, 145)

After the safety meeting, Hernandez, outraged that Stasko, the person who had caused problems for DeSpirito, was not even reprimanded by Bemis, reported the incident to Andrews as her Union Representative. (T. 99, 208, 216)

At 2:17 p.m. that day, Andrews reported the incident to Bemis’ anonymous hotline for employee complaints because she wanted something done against Stasko. Andrews reported the incident using her name and Pienkowski received a copy of it. (T. 37, 102, 216-217; GCX 4) The complaint stated:

These girls came to me and said that they were at a safety meeting and they had pizza. This gentleman that was sitting next to Michelle took out his cut knife, took the razor blade out with his bare fingers, cut the pizza, wiped it on his pants, put the blade back in his knife and put it in his pocket. The safety director Carl Passler said “I didn't see anything.” I am not allowed to touch or remove the razor blade and have to use gloves if I use the knife. This all happened right in front of the safety director. I wonder if he is

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<sup>12</sup> Hernandez’ testimony that Passler put his hand up to his face and turned away and pretended not to see Stasko using the knife to cut pizza is not credible. (T. 206) Nor is her testimony regarding Samsel during this meeting that he said, “Yeah, where's your cut glove?” as a joke. (T. 206) Her dislike for management and Stasko who in her words “was causing all these problems with other employees,” specifically DeSpirito was obvious. (T. 208) Easley also testified about the meeting, and like Passler, did not see Stasko using the knife to cut his pizza but did see him put it away. She was a much more credible witness than Hernandez. (T. 212)

going to go cut film with that blade because we make plastic bags for bread. (T. 38-39; GCX4)

Almost immediately after making that complaint, at 2:24 p.m., Andrews called Passler.

As he was not in his office at that time, she left him an irate voicemail. (T. 101, 117, 122; GCX 5(a))

“Hello, this is Lynn Andrews calling. I heard what happened at the safety meeting with a gentleman taking a razor blade out and cutting the pizza, putting it back in his knife to go cut film. And you said nothing, absolutely nothing. He used a razor blade between his fingers and didn't have any protection on, and you let that happen at a safety meeting? Unbelievable.” (T. 101,117, 120-121; GCX 5(a)-(b))

After listening to the voicemail, Passler forwarded it to Pienkowski. (T. 36, 119; GCX5(a))

Passler, knowing this voicemail referred to the pizza incident with Stasko, considered the voicemail from Andrews to be a safety complaint—that Stasko had taken the hook knife apart, taken the razor blade out of the knife and used the razor blade to cut the pizza without using the proper PPE. Bemis has PPE—cut gloves—that are worn for cutting tools that have exposed blades. (T. 127, 130) So, after receiving the voicemail, he called Eisley, the safety advocate, and instructed her to go out and talk to Stasko and make sure that he had replaced the blade in the knife and to talk to him about proper use of cutting tools. Eisley did as she was told but Stasko had already removed the blade and discarded it. She reported back to Passler that Stasko had already replaced the blade in the hook knife before she even got there. (T. 51, 55, 126-127,147, 151, 212-213)

On January 26, 2018, between 9:00 and 10:00 a.m., Andrews called Pienkowski on her cell phone while Pienkowski and Passler were in their morning leadership meeting. Andrews and DeSpirito had Pienkowski's cell phone number because they would call her to discuss Union

business. (T. 35-36, 127) Pienkowski got Passler and they went to her office to speak to Andrews. Pienkowski put Andrews on speakerphone. (T. 35, 104, 128) Both Pienkowski and Passler testified about this conversation. Andrews was angry. Andrews asked when they were going to conduct the investigation into Stasko cutting his pizza with his hook knife. She said that he was not wearing proper PPE while he was cutting the pizza using the cutting tool. She said that they were giving him preferential treatment and that Bemis had disciplined people for less and was curious what they were going to do about Stasko. Passler asked her what she wanted him to do. He said, "Do you want me to go out on the shop floor right now and write every single person up who's not wearing their PPE?" Andrews responded, "I can't talk about this right now" or "I don't have time for this" and hung up. (T. 35, 55, 128, 156) Andrews admitted that during this call she was very upset that Stasko was not disciplined. (T. 105)

Following the conversation with Andrews, neither Passler nor Pienkowski further followed up on the incident with Stasko because Passler had already directed Eisley to address the issue with him. (T. 36, 147) Stasko was not disciplined for this incident, which was considered a minor PPE violation. (T. 52, 131, 133) Passler testified that when the incident happened he did not think it was important at the time, and that even if he had seen and known for a fact that Stasko had taken out the blade from his hook knife, handled it without a protective glove on, cut a piece of pizza and put the blade back in, he still would not have issued disciplinary action for a first PPE offense like this. He would have taken Stasko aside and reported the incident to his supervisor and then proceed from there. (T. 131, 145, 155)

*I. Lynn Andrews' History of Reporting Safety Violations  
and Other Complaints to Bemis*

Passler testified that the type of safety issues Andrews reported to him, prior to this incident involving Stasko, mainly concerned air quality issues or temperature issues within the bag department, such as excessive dust or excessive haze. She had not reported any particular employee to him for safety violations. (T. 98 )

Andrews testified that other than her complaint against Stasko, she called the corporate complaint hotline on two other occasions. The first occasion was a couple of years ago when employee Joe Harvey was hurt at work and Bemis sent two managers, Cindy Sable and Frank Seltzer, to the doctor's with him. The doctor asked Harvey to remove his pants to show the affected area while the two managers were in the room. Harvey complained to her and she called the corporate hotline. The second occasion was two or three month ago when new pallets were ordered that had mold on them. An employee in the pit area where they handle the pallets got a rash and came to her because Passler just gave him a shirt with long sleeves to wear. That led her to call the corporate hotline. (T. 102-103) Each time she gave her name when she called. (T. 104, 217) Andrews admitted that prior to reporting Stasko for safety violations she never reported any employee for a safety violation directly to Bemis. (T. 98) She further testified that the only reason she reported Stasko was because another Union member complained about his conduct. (T. 97)

**V. LEGAL ANALYSIS**

*A. Credibility*

The Board accords significant weight to the credibility determinations of administrative law judges because they actually see and hear witnesses when testifying. See *Medeco Security*

*Locks*, 322 NLRB 664, 664 (1996) (“[C]redibility is a function not only of what a witness says but of how a witness says it.”) (citation omitted). The judge may consider “[a]ll aspects of the witness’s demeanor” in evaluating truthfulness, “including the expression of [the witness’s] countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication.” *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996) quoting *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977).

For purposes of resolving credibility issues, the ALJ may properly consider whether the act of voluntarily testifying in a Board proceeding potentially endangers the witness’s economic well-being. The Board has long applied this principle to employees testifying against their current employers. See, e.g., *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978) (“[T]he testimony of a witness [who is in respondent’s employ at the time of a hearing] is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken.”); *Shop-Rite Supermarket*, 231 NLRB 500, 505, fn. 22 (1977) (observing that employee testimony that is adverse to the employer is “given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false.”). This logic is also applicable—at least to some extent—to witnesses who testify to their potential detriment against their own union. See, e.g., *Iron Workers Union Local No. 378 (N.E. Carlson Construction)*, 302 NLRB 200, 205 (1991) (finding witness credible “because as a union member and shop steward, he was testifying against union solidarity and his own self-interest” by testifying against the union’s business agent); *Machinists District 751 (Boeing Co.)*, 270 NLRB 1059, 1060 (1984) (finding indicium of reliability in witness’s status as bargaining-unit member who had nothing to gain from testifying against his own union).

### *1. General Counsel's Witnesses Were Credible*

A close examination of the credible facts, both disputed and undisputed, the reasonable inferences from those facts, the inherent probabilities of the respective versions of the events and the inconsistencies between witnesses in this case as well as between witness testimony and documentary evidence, shows that the credibility issues should be resolved in favor of General Counsel's witnesses and against Respondent's witnesses.

An important factor in assessing a witness's credibility is whether the witness testified in the presence of other witnesses who might tailor their own testimony so as to avoid contradictory statements. In the instant case, all of General Counsel's witnesses testified outside the presence of other witnesses. In this regard, even Pienkowski, who was the Charging Party's designated representative during the hearing, was the first to testify. And Passler's testimony corroborated her testimony. See *Big Ridge Inc.*, 358 NLRB 1006, 1006 fn. 3 (2012) (finding corroboration of testimony to be a relevant and appropriate factor in determining credibility); *International Harvester Co.*, 226 NLRB 166, 168, fns. 11, 12 (1976) (crediting witness testimony where corroborated and discrediting witness testimony when uncorroborated); *West Irving Die Casting of Kentucky, Inc.*, 346 NLRB 349, 352 (2006) (finding witness testimony not credible where uncorroborated). Indeed, Passler and Pienkowski both were highly credible witnesses and candid in their answers to questions. Almost all of their testimony was unrebutted by Respondent. In contrast, Andrews, Respondent's designated representative pursuant to the sequestration order, remained throughout the hearing and was able to hear all the testimony prior to testifying for Respondent. Furthermore, all of General Counsel's witnesses were generally consistent, with normal and natural variations in recall, demonstrating that they testified from genuine recollection.

Stasko consistently answered questions readily and directly throughout his testimony. Moreover, much of his testimony was corroborated by other witnesses. In this regard, Samsel corroborated his testimony as to the incident with Andrews in the Press break room. Stasko also testified consistently on cross-examination in regards to this incident. Furthermore, his testimony concerning Bemis' policy concerning the wearing of hearing protection was corroborated not only by Passler but by Eisley, Respondent's witness. On cross examination, Respondent's counsel also questioned Stasko regarding Andrews' contention of what happened in the parking lot. Stasko's testimony corroborated Pienkowski's testimony. (T. 33-34, 46-47, 48, 84-85) Nothing in his testimony casts doubt on his credible and reliable testimony.

Samsel's testimony should also be credited. In key respects, he corroborated Stasko's testimony concerning the incident with Andrews. Although Samsel's testimony concerning the conversation he had with Davidovich varied from the affidavit he gave to the Board, overall his testimony was consistent as to the nature of what had been said. To further bolster Samsel's credibility, the morning after Davidovich threatened him, he immediately told Bemis about Davidovich's threat and wrote it down. Samsel agreed on cross-examination that the statement he gave Bemis the day after the incident was his best recollection of what occurred. (T. 183, 191, 194; RX1, RX2) Davidovich essentially corroborated Samsel by testifying that he told Samsel, "Well, you know, thankfully, it's not like in years past where people's toolboxes were getting vandalized, lockers were being caved in, or cars were being keyed." (T. 203) Samsel's testimony, while using different words, is consistent with both the statement and his affidavit and is more credible than Davidovich's version of events. Samsel honestly testified that he might have not have recalled certain incidents at the time he gave his affidavit. He also pointed out that

was not reasonable to expect him to recall everything and say exactly and perfectly what he said 10 months ago under this kind of stress. (T. 191)

*2. Respondent's Witnesses Should Not Be Credited  
Over General Counsel's Witnesses*

Respondent's witnesses, Andrews and Hernandez, betrayed their antipathy to Stasko and Samsel during their testimony. Their testimony often was self-serving and unbelievable and largely irrelevant to the legal issues. They hardly appeared to be disinterested witnesses. Their testimony should therefore receive little weight insofar as it conflicts with that of General Counsel's witnesses. Andrews' testimony that during her confrontation with Stasko in the Press break room that she said nothing more to him than could she speak to him the next day, was farfetched and self-serving and diminished her credibility, especially as she admitted that DeSpirito had told her that she should talk to "these people" about the investigation. (T. 214-215) Similarly, Andrews' attempt to portray her actions against Stasko in a favorable light by claiming that she only complained about the pizza incident involving Stasko to Bemis because Hernandez had complained to her, was negated by the tenacious, passionate and vindictive manner in which she pursued the matter. (T. 97, 99, 216)

Hernandez was also not a credible witness. Her dislike of those employees, such as Stasko, who had cooperated in the investigation of DeSpirito, which led to his discharge, was quite evident. (T. 208) She embellished the incident involving Stasko cutting the pizza to an unbelievable extent to include Passler pretending not to see the incident and Samsel joking about it. (T. 206) Eisley, another of Respondent's witnesses, corroborated Passler's account of the meeting rather than Hernandez' account. (T. 212)



Respondent's witness Davidovich should also not be credited. He was not a disinterested witness and his version of what occurred during his conversation should only be credited so far as it corroborates a key part of Samsel's testimony.

***B. Generally Applicable Section 8(b)(1)(A) Law***

Section 8(b)(1)(A) prohibits unions from restraining and coercing employees' Section 7 rights, including engaging in threats, violence, or other forms of intimidation. *North American Meat Packers Union (Hormel & Co.)*, 291 NLRB 390, 395 (1988), citing *Teamsters Local 298 (Schumacher Electric)*, 236 NLRB 428 (1978). In evaluating threatening statements, the Board applies an objective standard of "whether a remark can be reasonably interpreted by an employee as a threat," regardless of the actual effect upon the listener." *Teamsters Local 391 (United Parcel Service)*, 357 NLRB 2330 (2012), citing *Battle Creek Health System*, 341 NLRB 882, 894 (2004), quoting *Smithers Tire*, 308 NLRB 72 (1992). See also *Steelworkers Local 1397 (U.S. Steel Corp.)*, 240 NLRB 848, 849 (1979). A threat need not be specific to be found unlawful, and relevant context is taken into account. *United Parcel Service*, supra at 2330-2331 ("the fucking scab needs to be stopped" in response to filing an NLRB charge unlawful despite lack of express threat); *Teamsters Local 115 (Oakwood Chair)*, 277 NLRB 694, 698 (1985) (unlawful statements that supervisor would be "sorry" and "something could happen" to his car, in the context of a violent strike with mass picketing, blocking, and assaults).

A threat of reprisal by a Union representative to an employee for raising complaints about working conditions violates Section 8(b)(1)(A). See *McLean Trucking Co.*, 257 NLRB 1349, 1354 (1981); *U.S. Steel Corp.*, supra; *International Packings Corp.*, 221 NLRB 479, 484-85 (1975), enfd. 542 F. 2d 1163 (1<sup>st</sup> Cir. 1976). A threat of physical violence is clearly conduct which is likely to coerce and restrain employees in the exercise of their Section 7 rights. See

*YKK (U.S.A.) Inc.*, 269 NLRB 82 (1984) (sustaining objections based on threats of physical violence by union representatives during the critical period); *Electrical Workers IBEW Local 309, (R. Dron Electrical)*, 212 NLRB 409, 414 (1974) (finding violation of 8(b)(1)(A) based on threats of violence directed at traveler).

A union breaches its duty of fair representation “when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Demonstration of bad faith requires proof of fraud or deceitful or dishonest action. *Steel Workers (Cequent Towing Products)*, 357 NLRB 516, 517 n. 6 (2011) (citing *Electrical Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994)).

***C. Respondent, by Lynn Andrews, Impliedly  
Threatened Stasko with Unspecified Reprisals in  
Violation of Section 8(b)(1)(A)***

Based on both Stasko’s and Samsel’s credible testimony, in mid-December 2017, Andrews came into the Press break room, wagged her finger in Stasko’s face, the victim of DeSpirito’s alleged abuse, and angrily asked him that how could he do this to DeSpirito, and said that she was going to get to the bottom of this and conduct her own investigation. The phrasing of Andrews’ statement implied that the Union would deliberately investigate so as to discount Stasko’s side of the story in order to support or protect its officers. By doing so Andrews made an unlawful implied threat to Stasko that employees who oppose Respondent or report alleged misconduct by DeSpirito to Bemis, would be subject to unspecified reprisals. Her conduct sent a message that would reasonably tend to interfere with employees’ likelihood of opposing the Union, or reporting verbal harassment by its officers. *McLean Trucking Co.*, supra, 257 NLRB at 1354. In these circumstances, Respondent should be found to have violated Section 8(b)(1)(A).

***D. Respondent Violated Section 8(b)(1)(A) by  
Posting the Communicator on January 22, 2018  
in Two Locations at the Plant***

The Board is not charged with regulating the relationship between unions and their members and thus will not find a violation of Section 8(b)(1)(A) unless there is “some nexus with the employer-employee relationship and a violation of the rights and obligations of employees under the Act.” *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1424 (2000). Section 8(b)(1) “leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.” *Scofield v. NLRB*, 394 U.S. 423, 430 (1969); *Teamsters Local 896 (Anheuser-Busch)*, 339 NLRB 769 (2003). Thus, a union's discipline of a member is within the scope of Section 8(b)(1)(A) only if it: (1) impacts union members' relationships with their employer; (2) impairs access to the Board's processes; (3) pertains to unacceptable methods of union coercion such as violence; or (4) otherwise impairs policies embedded in the Act. *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1120 (2000); *Sandia National Laboratories, supra*. If the union's actions fall into one of the above four categories, the Board will then balance the affected employee's Section 7 rights against the legitimacy of the union interests at stake. See *Steelworkers Local 9292 (Allied Signal Technical Services)*, 336 NLRB 52, 54 (2001) (highlighting that use of balancing test is in accord with longstanding Board precedent).

In *Anheuser-Busch*, *supra* at 769-770, the Board found unlawful the following notice posted on the union's bulletin board:

“IF YOU HAVE A PROBLEM WITH A UNION BROTHER OR  
SISTER, CONTACT YOUR SHOP STEWARD OR THIS  
OFFICE.

Remember: Going to management about a fellow Union member could leave you open to internal charges.”

The Board reasoned that cases such as these require balancing of two competing interests: a union’s legitimate interest in promoting solidarity among the unit, and the Section 7 rights of employees to report workplace issues to management. The Board found that the notice in *Anheuser-Busch* restrained Section 7 rights by (1) preventing concerted complaints to management about workplace safety, and (2) compelling employees to act in contravention of a collective bargaining agreement. *Id.*; *Allied Signal Technical Services Corp.*, supra, 336 NLRB at 54 fn. 5.

Respondent’s notice here is within the scope of Section 8(b)(1)(A) as it seeks to impact union members’ relationships with their employer. In this regard, Respondent’s notice threatened to blacklist employees from union jobs for turning in a fellow union member to Bemis. See e.g. *Teamsters Local 1040 (American Dr. Pepper Bottling Co.)*, 174 NLRB 1153, 1154-55 (1969) (threat to blackball employees by union unlawful as it impaired member’s status as an employee); *Plumbers Local 100 (The McCally Co.)*, 188 NLRB 951, 954 (1971) (threat to blacklist members of a sister local unlawful); *Pacific American Shipowners Association*, 98 NLRB 582, 640 (1952) (threat to blacklist members violates Section 8(b)(1)(A)).

Respondent’s notice here, similar to the one in *Anheuser-Busch*, raised the legitimate interest of promoting union member solidarity. However, this needs to be balanced against employees’ Section 7 right to raise workplace concerns such as reporting harassing behavior of Respondent’s officers. Respondent’s notice reasonably tended to discourage employees from engaging in such Section 7 activity. Moreover, Respondent’s publication—signed by DeSpirito, the alleged harasser—went beyond a properly adopted rule imposing internal union penalties

because it sent a clear message that those members who engage in the Section 7 activity of reporting harassing behavior could result in blacklisting by Respondent from union jobs. While there is no contravening duty in the collective bargaining agreement here to report harassment to Bemis, as there was in *Anheuser-Busch*, the threat to blacklist members goes beyond lawful intraunion discipline, as it is not “restricted to the status of a member, as a member, rather than as an employee.” *Sandia*, supra, 331 NLRB at 1420. See also, *American Dr. Pepper Bottling Co.*, supra.

Respondent’s notice also contravenes the well-established policy embedded in the Act that prevents the internal discipline of a member who seeks to cooperate with the contractual grievance-arbitration machinery. See *Steelworkers v. Warrior Navigation Co.*, 363 U.S. 574, 578 (1960) (emphasizing that arbitration of labor disputes is important to industrial peace and is part and parcel of the collective bargaining process). The Board has long held that a union violates Section 8(b)(1)(A) by subjecting employee-members to a disciplinary hearing as well as by the assigning of fines or other discipline for appearing as a witness at an arbitration and giving testimony deemed contrary to the interests of other employees or to the union itself. *Graphic Communications Local 388M (Georgia Pacific)*, 300 NLRB 1071, 1072-1073 (1990); *Teamsters Local 992 (UPS Ground Freight)*, 362 NLRB No. 64, slip op. at 1, fn. 1 (2016) (Section 8(b)(1)(A) prohibited threat of union discipline, even where it did not impact the employment relationship where union business agent unlawfully threatened member with internal union charges if he testified for the employer at an arbitration proceeding). The Board has extended this policy to finding a violation even where a grievance has not yet been filed but is expected. *Sheet Metal Workers Local 550 (Dynamics Corp.)*, 312 NLRB 229, 233-234 (1993); *Oil Workers*

*Local 7-103 (DAP, Inc.)*, 269 NLRB 129, 130-31 (1984); *Cement Workers D-357 (Southwestern Portland Cement)*, 288 NLRB 1156, 1157 (1988).

Here, at the time that Respondent published the *Communicator*, shortly after DeSpirito was terminated, it was clear that a grievance would be filed over DeSpirito's discharge if one had not already been filed.<sup>13</sup> One could safely say that the employees being threatened with internal union discipline by the notice were those who had cooperated with Bemis in the investigation of misconduct against Respondent's President and who were going to continue to participate in the grievance machinery contrary to Respondent's interests. Permitting interference with Bemis' investigation of such misconduct or with its preparation for arbitration would render access to the grievance process nugatory. *Dynamics Corp.*, supra, at 234. This important policy is essential to the integrity of the grievance arbitration process, as well as employees' Section 7 rights described above, and are not out-weighted by the Respondent's interest in promoting member solidarity among the collective bargaining unit. On the contrary, under the circumstances of this case, such interests must give way to the strong public policy favoring the contractual grievance arbitration process and employees' Section 7 rights. Accordingly, the balance here supports finding that Respondent's notice violates Section 8(b)(1)(A).

***E. Respondent, by Kevin Davidovich, Violated Section 8(b)(1)(A)  
When He: (i) Threatened Mike Samsel with Physical Violence  
for Cooperating in Bemis' Investigation against Dominic  
DeSpirito; and (ii) Told Mike Samsel that Respondent's  
President had Instructed Respondent's Board Members to  
Harass Employees Who Reported Alleged Misconduct By  
Respondent's President to Bemis***

When a labor organization or its agents threaten employees with bodily harm, such conduct tends to interfere with employee protected rights and, consequently, runs afoul of

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<sup>13</sup> The record is silent as to when Respondent filed the grievance over DeSpirito's discharge.

Section 8(b)(1)(A) of the Act. See, *Union National de Trabajadores (Carborundum Co.)*, 219 NLRB 862, 863 (1975), *enfd. as modified*, 540 F.2d 1 (1st Cir.1976).

As shown above, in response to Samsel's complaint about notes with the word "rat" on them and homemade paper rats being left at his work station because of his cooperation with Bemis' investigation against Respondent's President, Davidovich responded that he was lucky it was not like the old days, i.e., caving in skulls, smashing lockers, people's personal properties and cars. This statement was unambiguously violent and threatening, and would reasonably tend to discourage employees from either reporting Section 7-related concerns or complaining about or opposing Respondent. "The Board 'does not consider lightly . . . threats of bodily harm even when made to one employee.'" *Machinists Dist. 70 (Spirit Aerosystems)*, 363 NLRB No. 165, slip op. at 9 (2016), citing *YKK (U.S.A.) Inc.*, supra, 269 NLRB at 82, fn. 3. The fact that Davidovich hedged his language by using the words "Lucky it isn't done like the old days" is immaterial. In the context in which the statement was made, it was clearly a threat. A union agent slyly telling an employee "lucky it isn't like the old days" and then going on to catalogue various types of physical violence and property damage is a classic veiled threat and clearly unlawful. See e.g. *United Parcel Service*, supra, 357 NLRB at 2330; *Oakwood Chair*, supra, 277 NLRB at 698. Even assuming that Davidovich's version of the statement is credited over Samsel's version, Davidovich's statement is still clearly coercive and threatening. It does not matter whether Samsel honestly feared that Respondent would engage in physical violence or property damage against those who cooperated in Bemis' investigation; viewed objectively, Davidovich's statement clearly sought to coerce and intimidate Samsel because of his cooperation with Bemis in its investigation of DeSpirito.

Davidovich then followed up his statement by stating that DeSpirito was telling Union Board members to harass employees, presumably referring to the employees who the Union suspected or knew participated in Bemis' investigation of DeSpirito's harassment. This is consistent with the remarks by DeSpirito to Samsel on the day that he was suspended that "nobody was safe, they better watch their back [sic]" and that DeSpirito "wasn't going to do anything for them." Given that Samsel and Stasko were already being impacted by their cooperation with Bemis in the investigation of DeSpirito's alleged harassment, this second statement by Davidovich is also clearly coercive.

Furthermore, Davidovich, as Vice President, clearly made the threatening remarks in his capacity as Respondent's admitted officer and agent. See *Security, Police & Fire Professionals (SPFPA) Local 444*, 360 NLRB 430, 435 (2014) (The Board regularly finds elected or appointed union officials to be agents of that organization); *Electrical Workers IBEW Local 453 (National Electrical)*, 258 NLRB 1427, 1428 (1981); *Penn Yan Express*, 274 NLRB 449 (1985). Indeed, Davidovich referred to DeSpirito's instructions to Board members in the same conversation.

Furthermore, despite Respondent's apparent argument at the hearing that the statements are not covered by the Complaint allegations, the statements made by Davidovich are consistent with the language alleged in paragraph 6(c) of the Complaint that "Respondent . . . threatened an employee that Respondent would engage in physical violence and cause property damage if employees were to express opposition to Respondent, or to report alleged misconduct by Respondent's President to the Employer . . . and . . . told an employee that Respondent's President had instructed Respondent's Board members to harass employees ..." (GCX1(i))

For the forgoing reasons, Respondent violated Section 8(b)(1)(A) by Davidovich threatening physical violence against those employees who had cooperated in Bemis'



investigation against Respondent's President and telling Samsel that Respondent's President had told Board members to harass those who had cooperated in the investigation.

#### ***F. Applicable Section 8(b)(2) Law***

Section 8(b)(2) prohibits a union directly or through its agents from causing or attempting to cause an employer to discriminate against an employee in regard to any term or condition of employment in violation of Section 8(a)(3) of the Act. A union which causes an employer to discriminate against an employee presumptively breaches its fair duty of representation. See *Acklin Stamping*, 351 NLRB 1263, 1263 (2007). The Board does not require that a request to discipline or discharge be made explicitly. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997); *St. Joe Paper Co.*, 135 NLRB 1340, 1341-1342 (1962), enfd. 319 F.2d 819 (2d Cir. 1963) (Board found the union's president telling the employer's general manager that the charging party was a "trouble maker," "a bad actor," "a problem," one who "had to be watched," and that "he was always running to the Labor Board" who then subsequently terminated the charging party, violated Section 8(b)(2) of the Act even though the union president never made an explicit request to the company to discharge the charging party). See also *Big Moose LLC*, 359 NLRB 300, 301 (2012). The Board has found the necessary element of causation in a union's reporting of supposed employee misbehavior to an employer. *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004) (union seized upon union dissident's statement, "next time I see you I'm going to kick your ass. I'm not afraid of you" by reporting this to employer as a threat in violation of employer's handbook knowing that dissident employee would be discharged for making the statement).

To determine whether Union conduct violates 8(b)(2), the Board has applied both the duty of fair representation standard and the analytical framework established in *Wright Line*, 251

NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982). See, e.g., *Caravan Knight Facilities Mgmt., Inc.*, 362 NLRB No. 196, slip op. at 4 (2015) enf. den. on other grounds 844 F.3d 590 (6th Cir. (2016)); *Good Samaritan Medical Center*, 361 NLRB 1294, 1295 (2014). It is not necessary to find that a union has violated both standards in order to find a violation. See *Spirit Aerosystems*, supra, 363 NLRB No. 165, slip op at 1, fn. 3; *Good Samaritan Medical Center*, supra. A derivative violation of Section 8(b)(1)(A) also arises where an 8(b)(2) violation has been proven. *SPFPA, Local 444*, supra, 360 NLRB at 435. The reason is that a union's causation of an employee's change in terms and conditions of employment necessarily constitutes restraint and coercion of the employee's exercise of his Section 7 rights. *Id.*; *Postal Workers*, 350 NLRB 219, 222 (2007).

Under the duty-of-fair-representation standard, whenever a labor organization causes the discipline or discharge of an employee, there is a rebuttable presumption that it acted unlawfully because by such conduct it “demonstrates its power to affect the employees' livelihood in so dramatic a way as to encourage union membership among the employees.” *Graphic Communications Workers Local 1-M (Bang Printing)*, 337 NLRB 662, 673 (2002), quoting *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382 fn. 2 (1984). See also *Good Samaritan*, supra, at 1295. A union may rebut the presumption that it acted unlawfully in doing so by “showing that its action ‘was necessary to the effective performance of its function of representing its constituency.’” *Acklin Stamping*, supra, 351 NLRB at 1263, quoting *Graphic Communications Workers Local 1-M (Bang Printing)*, supra. The Board has also stated that the union may rebut the presumption by showing that its actions were “done in good faith, based on rational considerations, and were linked in some way to its need effectively to represent its

constituency as a whole.” *Spirit Aerosystems*, supra, 363 NLRB No. 165, slip op at 1, fn. 3 quoting *Plasterers, Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981).

Under the *Wright Line* analysis, the General Counsel must prove, by a preponderance of the evidence, that the employee engaged in activity protected by the Act, that the union was aware of the employee's protected activity and that the union was motivated by animus against the protected activity in taking adverse action against the employee. If the General Counsel meets this burden, the burden shifts to the union to show, again by a preponderance of the evidence, that the same action would have been taken against the employee even in the absence of protected activity. See *Good Samaritan Medical Center*, supra, 361 NLRB at 1296 (union representatives reporting employee's conduct to employer unlawful as union reasonably would have foreseen that it would lead to employee's discipline); *SPFPA, Local 444*, supra, 360 NLRB at 435 (union's reporting of employee to employer “smacked of discriminatory motivation”); *Town and Country Supermarkets*, supra, 340 NLRB at 1411 (violation where the union reported a threat as a pretext to purge the bargaining unit of a vocal opponent to the union president's administration of the union); *Stagehands Referral Service*, 347 NLRB 1167, 1170-1171(2006) (union's truthful observation that employee had missed work was undercut by evidence that the union took no action against other employees with similar or worse attendance records).

***G. Respondent, by Lynn Andrews, Violated Section 8(b)(1)(A) and (2) by Seeking to Have Joe Stasko Disciplined For Not Wearing His Hearing Protection***

It is undisputed that on two occasions Andrews reported Stasko to Bemis with the intent of having him disciplined. According to Andrews these incidents occurred on the very same day. The first occurred when she saw Stasko not wearing his hearing protection for a few moments. Almost immediately after seeing him without his hearing protection, she reported him to both

their supervisors stating, “Nobody says anything. He gets away with anything.” (T.98) Although she did not actually mention his name, she admitted that it was clear who she was referring to. In fact, shortly after, the safety advocate spoke to Stasko about wearing his hearing protection. Andrews claimed that she only complained about him because another union member had complained to her.

The second incident occurred after Stasko used the razor from his hook knife without any PPE to cut some pizza at a safety meeting that Passler had attended. This was a safety violation. He was not disciplined partly because Passler did not see the incident and also because it was a minor safety violation, which did not merit any discipline. Passler did, however, ask the safety advocate to make sure that Stasko had replaced the razor blade, which he had. Although Andrews did not witness the incident, Andrews, as Hernandez’ Union Representative, immediately contacted Bemis’ corporate hotline to complain about the incident. She then called Passler to complain to him that Stasko had not been disciplined. When he did not pick up she left an irate voicemail clearly indicating that she was upset that Stasko had not been disciplined, stating, “you said nothing, absolutely nothing ... you let that happen at a safety meeting!?” (GCX5(b)) Still not satisfied, she called Pienkowski in HR the next morning to make clear her displeasure that Stasko had not been disciplined. She spoke with Pienkowski and Passler arguing that other employees had been disciplined for less and wanting to know what they were going to do to Stasko. It is clear that Andrews’ complaints to Bemis, were made for the sole purpose of getting Stasko in trouble and causing him to be disciplined. *Good Samaritan Medical Center, supra*; *Jefferson Smurfit Corp, supra*. Indeed, her anger that he was not disciplined immediately was clear and obvious when she left a message for Passler on January 25, 2018 and when she spoke with Pienkowski and Passler the next morning.

The record as a whole demonstrates that Andrews, although an employee, was acting in her capacity as an officer of Respondent, and that she was an agent of Respondent. *Caravan Knight Facilities Mgmt.*, supra, 362 NLRB No. 196, slip op. at 3; *SPFPA, Local 444*, supra, 360 NLRB at 436 (“The Board regularly finds that elected or appointed union officials to be agents of that organization. ... Although the holding of elective office does not mandate a finding of agency per se, it is persuasive and substantial evidence that will be decisive in the absence of compelling contrary evidence.”); *National Electrical*, supra; Respondent has presented no compelling contrary evidence. Specifically, Andrews admitted that she reported Stasko for not wearing his hearing protection because another member had complained to her. And with regard to the pizza incident, Andrews admittedly acted as a Union representative in pursuing discipline for Stasko once Hernandez had contacted her. Respondent has not argued that Andrews did not have actual authority in her crusade against Stasko, but even if Respondent had not specifically authorized her conduct, she had the apparent authority to act on behalf of Respondent. As a union officer, Andrews was regularly held out to Bemis to represent Respondent’s interests. At no time has Respondent taken steps to disavow her conduct or distance itself from it, effectively ratifying or condoning her actions. *Penn Yan Express*, supra.

Respondent will not meet its burden of proof under *Wright Line* regarding Andrews’ attempt to cause Stasko to be disciplined. With regard to her safety complaint that Stasko was not wearing his hearing protection, Respondent posited that Andrews had heard that from other employees that Stasko habitually failed to wear his hearing protection. However, the record failed to show that Stasko was any worse than other employees in terms of wearing his hearing protection. At most, Eisley testified that she had reminded Stasko on a half dozen occasions over an unspecified time period to put his hearing protection back on. Moreover, Respondent did not

produce evidence of other employees who were disciplined for engaging in that minor safety violation. At best, the record shows that an employee was disciplined for refusing to wear his safety glasses after being told numerous times to wear them. Furthermore, Andrews had no knowledge even of Stasko's identity until he cooperated in the investigation of Respondent's President. Suddenly, in the less than two month period after DeSpirito was suspended, in her view Stasko was a major violator of Bemis' safety policies. The record further showed that Bemis' policy with regards to wearing PPE was to remind employees when they were not wearing their hearing protection to put it on, rather than seeking to discipline them for it. This was pointed out to Andrews by Passler in their conversation and resulted in her ending the conversation.

With regard to Andrews' safety complaint concerning Stasko using the razor blade from his hook knife, Respondent's defenses are equally as unavailing. Respondent argues that Andrews received a complaint from another employee about Stasko and she was just following up on that with Bemis as she does "when one union member is being [disciplined] about the same thing another union member is already doing or getting away with." (T. 97) This defense is belied by Andrews' own testimony. Andrews, who has been Secretary Treasurer for about 12 years, admitted that she had never reported any employee for a safety violation directly to Bemis prior to reporting Stasko to Bemis. Nor did Respondent point to any similar safety violations for which other employees were given discipline. Respondent may point to the fact that Andrews has called the corporate hotline on other occasions as evidence that she was not acting differently here than she had on other occasions. However, on the two other occasions that Andrews called the corporate hotline to protest an action, her intent was to protect unit employees from actions by Bemis rather than cause them discipline. In her first example, she called to protest the fact

that an injured employee had been forced to undress in front of HR personnel. In her second example, she called to protest Passler's response to an employee who had gotten a rash from a moldy pallet. These two situations are starkly different from her reason for calling the corporate hotline in the incident concerning the pizza. Andrews' other safety complaints made to Bemis also were for the benefit of the bargaining unit as a whole, mainly concerning air quality issues or temperature issues within the bag department. Again this is a starkly different type of safety violation than the safety incidents she reported against Stasko. Respondent has not rebutted the initial inference of unlawful motivation by showing that Respondent would have made this safety complaint against Stasko for reasons other than Stasko's protected activity in cooperating in Bemis' investigation into DeSpirito's alleged misconduct.

Under the duty of fair representation framework, Respondent also has no valid defenses. Respondent admittedly sought to cause Stasko's discipline. There is no evidence suggesting the discipline was necessary to the effective performance of Respondent's function of representing its constituency. Respondent has failed to show that other employees were treated differently for engaging in a minor safety violation. Rather, Respondent's action was intended to retaliate against Stasko because of his cooperation in the investigation of Respondent's President alleged misconduct, not unit welfare. Thus, under this framework, the presumption that Respondent's conduct was unlawful remains unrebutted, and Respondent must be found to have violated the Act.

Respondent has failed to provide good-faith, rational considerations for its actions and further, failed to prove that Andrews would have complained against Stasko on either occasion had he not cooperated in Bemis' investigation against Respondent's President. Andrews has admitted that she wanted Stasko to be disciplined and was very upset that nothing happened to

him. This is so, even though she also admitted that she had never reported an employee for a safety violation previously. See *SPFPA, Local 444*, supra at 435 (2014); *Jefferson Smurfit Corp.*, supra, 323 NLRB at 1044 (union official belatedly reported employee for alleged racial harassment only after dissident activity, contrary to its practice of not involving management in disputes between employees). In these circumstances, Respondent, through Andrews, attempted to cause Bemis to discipline Stasko in violation of Section 8(b)(2) of the Act. Andrews' conduct impacted Stasko directly and thus also tended to restrain and coerce him—and other employees—in the exercise of their protected rights in violation of Section 8(b)(1)(A) of the Act.

#### ***H. Respondent's Purported Justifications for Its Adverse Actions Against Stasko are Pretextual***

Respondent raised as an affirmative defense at the hearing that Stasko and Samsel were both treated better than DeSpirito by Bemis concerning discipline and somehow this justifies Respondent's actions in trying to have Stasko disciplined.<sup>14</sup> As DeSpirito's suspension and discharge by Bemis were not an issue in this proceeding, this defense is clearly without merit. Here, Respondent, not Bemis, was responsible for trying to cause the discipline against an employee and fellow member in retaliation for that member's cooperation with Bemis. Accordingly, this defense must fail.

## **VI. CONCLUSION AND REMEDY**

In conclusion, the record evidence and applicable law demonstrates conclusively that Respondent violated Section 8(b)(1)(A) of the Act by engaging in unlawful coercive statements; and that Respondent violated Section 8(b)(1)(A) and (2) of the Act by reporting employee and member Stasko to Bemis for purported safety infractions sometime in January 2018 and on

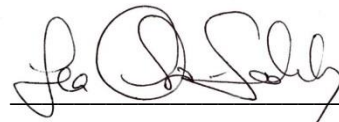
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<sup>14</sup> Respondent tried to put in evidence regarding Samsel's alleged improprieties—none of which were safety violations. Your Honor correctly sustained the objection. 184-185)



January 25 and 26, 2018 in an attempt to cause Bemis to discipline Stasko because (i) Stasko participated in Bemis' investigation of alleged misconduct by Respondent's President and (ii) for reasons that are arbitrary, discriminatory, or in bad faith. As remedies for these violations, Counsel for the General Counsel requests that Respondent should be required to cease and desist from its unfair labor practices, post an appropriate an appropriate Notice to Employees and Members at the Bemis Plant, a proposed copy of which is attached as Appendix A, and mail copies of the Notice to all its members to advise the bargaining unit of Respondent's violations of the Act and any other relief you deem appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lea F. Alvo-Sadiky', written over a horizontal line.

LEA F. ALVO-SADIKY  
Counsel for the General Counsel  
National Labor Relations Board  
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Dated: December 3, 2018

## **APPENDIX A**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES GOVERNMENT**

The National Labor Relations Board has found that we violated  
Federal labor law and has ordered us to post and obey this notice.

### **FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** impliedly threaten you for reporting to the Employer the harassing behavior of coworkers or Union officers, or for participating in the Employer's investigation into such reports.

**WE WILL NOT** post notices on union bulletin boards or otherwise inform members that going to the Employer to complain about fellow members could leave you open to fines, being blacklisted, or internal union charges.

**WE WILL NOT** threaten you with physical or property violence for reporting to the Employer the harassing behavior of coworkers or Union officers, or for participating in the Employer's investigations into such reports.

**WE WILL NOT** instruct our officers, agents, or representatives to threaten to harass you for reporting to the Employer the inappropriate behavior of your coworkers or Union officers, or for participating in the Employer's investigation into such reports.

**WE WILL NOT** retaliate against you for reporting to the Employer the inappropriate behavior of coworkers or Union officers, or for participating in the Employer's investigation into such reports, by informing the Employer of minor safety violations in an effort to cause you to be disciplined or otherwise harass you.

**YOU HAVE THE RIGHT** to freely discuss your terms and conditions of employment and to bring issues and complaints to the Employer or other entities on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

**WE WILL NOT** in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

**Graphic Communications Conference/International  
Brotherhood of Teamsters Local Union No. 735-S**

(Labor Organization)

**Dated:** \_\_\_\_\_ **By:** \_\_\_\_\_  
(Representative) (Title)

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*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.*

615 Chestnut St Ste 710  
Philadelphia, PA 19106-4413

**Telephone:** (215)597-7601  
**Hours of Operation:** 8:30 a.m. to 5 p.m.

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

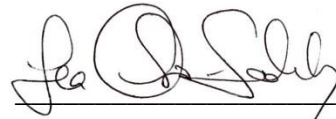
## CERTIFICATE OF SERVICE

I hereby certify that copies of the **BRIEF BY COUNSEL FOR THE GENERAL COUNSEL** in Case 04-CB-215127 was served on the 3rd day of December 2018, on the following persons by email:

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lea F. Alvo-Sadiky", is written over a horizontal line.

LEA F. ALVO-SADIKY  
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